Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1997

—

STEPHEN RUSSELL HOLGATE;
KAREN LEE HOLGATE
PRO SE — *Petitioners,*

V.

COMMISSIONER OF
INTERNAL REVENUE SERVICE — *Respondent.*

On Petition For Writ Of Certiorari
To The
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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21pp

QUESTIONS PRESENTED

Using statistics from the Department of Labor and based on national "estimated averages" of persons in similar occupations, the Internal Revenue Service (IRS), in its discretion, may levy taxes against taxpayers. Once taxes are levied, using this "indirect method," the taxpayer must assume the "burden of proof" and is forced to sue the IRS as "prosecutor" in an attempt to disprove a negative. This burden when applied to a taxpayer who has not earned the "estimated" income becomes an onerous levy.

The questions presented are:

(1) Whether it is a violation of a citizen's right to due process of law to force that individual to assume the "burden of proof" when faced with a tax levy based on only a national "estimated average" and with no "bill of particulars" presented to sustain the claim?

(2) Is it an abuse of power and violation of an individual's rights for the IRS to ignore the Statute of Limitations and a violation of an individual's right to arbitrarily require the re-filing of a tax return(s)?

(3) Whether the ruling of the United States Court of Appeals for the Ninth Circuit in the present case denying the Petitioner's request for suspension of additional taxes for the years in question was an abuse discretion?

(4) Do taxpayers currently involved in disputes dealing with abuse of IRS power have the same protections that are now codified with the passage P.L. 105-206?

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C.C. Phillippe, (DC) 59-2 USTC 9654, 173 F supp 582

"The taxpayer is entitled to a bill of particulars concerning the income he is alleged to have received and failed to report..."

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

MAY IT PLEASE THE COURT,

Petitioners, Stephen Russell Holgate and Karen Lee Holgate, respectfully pray that a Writ of Certiorari issue to review the Opinion and Judgment of the Untied States Court of Appeals for the Ninth Circuit entered in this matter on February 23, 1998.

OPINION AND JUDGEMENTS BELOW

Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit, entered February 23, 1998, are reprinted in the Appendix to the Writ at pages App. 1 through App. 3. The Opinion and Judgment of the United States Tax Court, entered March 28, 1997, are reprinted in the Appendix to the Writ at pages App. 4 through App. 5.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit was entered February 23, 1998, affirming in part and vacating in part the United States Tax Court decision dated March 28, 1997. The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

STATUTES AND REGULATIONS INVOLVED

This case involved the following provisions of the United States Code:

1998: PL 105-206 Sec. 3001. Burden of Proof
(a)(1)GENERAL RULE-If, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by subtitle A or B, the Secretary shall have the burden of proof with respect to such issue.

(b)USE OF STATISTICAL INFORMATION ON UNRELATED TAXPAYERS-In the case of an individual taxpayer, the Secretary shall have the burden of proof in any court proceeding with respect to any item of income which was reconstructed by the Secretary solely through the use of statistical information on unrelated taxpayers.

STATEMENT OF THE CASE

The primary focus of this case centers on the issue of whether the IRS exceeded its authority and violated the right of the taxpayer when it subjectively levied taxes on Petitioner based solely on a national "estimated average" derived from the Department of Labor statistics for similar occupations.

Also at issue is the power of the IRS to require payment of taxes on the above "estimated average" and then place the "burden of proof" on the taxpayer by forcing him to sue the IRS thus becoming the prosecutor who must prove the IRS wrong.

In all filings it is evident that the IRS is the one making all the allegations and the Petitioners are placed in the role of defendant while legally charged with being the "prosecutor."

It is the contention of the Petitioner that the requirement of IRS to prove something that didn't happen is a travesty of law. In this case, the IRS claims that Mr. Holgate was uncooperative because he did not produce documents, failed to reach a settlement and would not stipulate to facts.

Mr. Holgate met with representatives of the IRS on several occasions, spoke with them by telephone, communicated by correspondence, etc. He produced all the documentation he could. It wasn't what the IRS wanted. The Petitioner did refuse to enter into a settlement agreement on income he did not earn; and he agrees he would not stipulate to allegations that were not facts. For this he was labeled "uncooperative."

Mr. Holgate also questions the ability of the IRS, after the Statute of Limitations, to force a taxpayer to resubmit returns they claim were not received, and when received, re-file the returns, thus triggering a new start date for establishing a new Statute of Limitations.

The following facts seek to clarify the particulars of this case and further to seek a decision on the overriding questions about the legality of estimating a taxpayers income based on national Department of Labor statistics and placing the "burden of proof" on the taxpayer to disprove the IRS' estimate and which condemns the taxpayer who cannot produce documentation that proves that income was not earned.

Mr. Stephen Russell Holgate, Petitioner, is, and has been since 1976, a California land developer who prior to the mid-1980's made a good income. However, due to the prolonged economic downturn which drastically affected California's real estate market, the Petitioner experienced a drastic reduction in income.

During the years 1985-1988, the Petitioners' accountant, Mike Rivello, CPA, filed tax extensions and later filed all four years at one time. In a signed affidavit, Mr. Rivello stated he did in fact file all four years at one time. No taxes were due.

In accordance with Internal Revenue Service (IRS) regulations, the years 1990 and 1991 were not filed because there was insufficient income (below minimum income requirements).

On September 25, 1996, the Petitioners received correspondence from the IRS appeals officer, Mr. Tom Leonard, in relation to the above mentioned tax years. Later Mr. Timothy Salel, attorney for the IRS, became the contact person. Petitioners were told that while the years 1985 and 1987 were filed in July of 1991, no tax returns were on file for the years 1986 or 1988. Further the IRS refuted that the Petitioners were not required to file tax returns for the years 1990 and 1991.

In 1993 Mr. Holgate received a telephone call from the Laguna Niguel, California, IRS office. He was told they did not have tax returns for 1986 and 1988. Mr. Holgate's accountant, Mike Rivello produced a bound copy of all four years (1985-1988) that he had filed at the same time. At the demand of the IRS representative, Mr. Holgate, resent the two years in question. At no time were the Petitioners informed by IRS that the IRS would re-file the years in question and that by doing so, the elapsed Statute of Limitations would be invalidated and that the new date for figuring the Statute of Limitations would be the new filing date—1993.

In later discussions with Mr. Salel, he refused to accept the Mr. Rivello's sworn declaration that all four years, 1985-1988, had been filed in 1991. When Petitioner Holgate asked Mr. Salel what it would take to prove the returns had been filed, Mr. Salel replied that there was nothing a taxpayer could do to prove returns had been filed—even if the returns had been sent registered mail. He went on to say the only thing a registered or certified mailing would prove was that an envelope had been received—not that a return was in the envelope. Mr. Salel said the "burden of proof" was

always on the taxpayer and even a sworn statement from an accountant wasn't enough.

During this initial period of time, the IRS stated that the Petitioners had underpaid taxes due the government. When Mr. Holgate showed the IRS representatives the returns in question, the IRS stated that according to the "Indirect Method," which calculates estimated income and expenses for similar professions throughout the nation, Holgate must have made more money and was therefore required to pay more taxes.

No evidence or "bill of particulars" was presented to support the IRS claim that income had been earned in excess of that claimed and supported by Petitioner Holgate's documentation. C.C. Phillippe, (DC) 59-2 USTC 9654, 173 F supp 582 states that, "The taxpayer is entitled to a bill of particulars concerning the income he is alleged to have received and failed to report, ..."

Petitioner Holgate tried to explain that California was in the midst of a unprecedented and prolonged real estate recession that had devastated the development industry in California. He pointed out that it wasn't possible to compare California developers with developers in states that were experiencing an economic upswing. There is no comparison.

Mr. Holgate also raised the question that if the Department of Labor Statistics "Indirect Method" was used for all four years (1986, 1988, 1990 and 1991), what was to prevent the IRS from ALWAYS applying the "Indirect Method" to all industries and occupations? Wouldn't that eliminate the requirement for people to file any tax returns? And would it always then fall to the taxpayer to assume the "burden of proof" to refute the government's income averaging technique? The IRS representatives made no reply.

In his Trial Memorandum, Mr. Salel made several assertions to justify his estimated income for the Petitioner. They were as follows:

IRS: Tax returns for 1986 and 1988 were filed on August 26, 1993.

FACT: Returns for years 1986 and 1988 were filed in July, 1991. (Mr. Salel even stated in his original answer that these returns were filed in July, 1991.)

IRS: Petitioner received money from individuals to build houses.

FACT: Petitioner is NOT a builder and has NEVER built a single house.

IRS: Petitioner earned money from the sale of real estate.

FACT: Petitioner has no real estate license. Due to a bankruptcy, filed in October, 1989,Petitioners lost all personal real estate holdings except for the Dalea property which was sold in 1987. (See below)

IRS: Petitioner owns real estate on Dalea in Palm Desert, California.

FACT: Petitioner sold the Dalea property in October, 1987. It was reported on the 1987 tax return which was filed along with the 1986 and 1988 returns in July, 1991.

IRS: Petitioner used corporate income to buy groceries, clothing and other common personal items; and that Petitioner used unreported income to pay for personal living expenses.

FACT: This entire statement is untrue. The IRS did not produce evidence to substantiate these false allegations. (Again, the "burden of proof" was placed on the Petitioners to prove the IRS wrong—an impossible situation.)

Also in his Trial Memorandum, Mr. Salel stated that Mr. Holgate was uncooperative and didn't produce documentary evidence. He said one example of Petitioner Holgate's uncooperative demeanor was that he failed to reach a settlement agreement with IRS.

Mr. Salel's claims are unjustified. During the months prior to tax court, numerous telephone conversations, correspondence, personal messages and a three hour meeting took place between IRS and Mr. Holgate. Petitioner Holgate produced all available documentation. What Petitioner was unable to provide was proof of a negative. In an effort to cooperate Mr. Holgate repeatedly asked what he could have provided that would prove something did not happen—income that was not earned. Mr. Holgate did refuse to enter into a settlement that would have required him to pay money on income he did not earn with money he did not have. This was labeled "uncooperative" by IRS's Mr. Salel.

Mr. Salel insisted that even though all other court proceedings require the "burden of proof" to be placed on the accuser, in all instances with the IRS, the "burden of proof" rests with the taxpayer who in order to defend himself from false claims of taxes owed must file against the government and then prove his innocence. This action forces a taxpayer who has already suffered severe financial setback to try to fight false claims by the government with little or no funds to do so. In the case of Petitioner Holgate, no funds were available to hire an attorney to fight the charges and he had to assume the additional burden of trying to defend himself in a legal system designed to favor the IRS.

In addition, Mr. Salel informed Petitioner Holgate that he must stipulate to the Respondent's requests and bragged that the Respondent sets the rules in Tax Court. Mr. Holgate did refuse to stipulate to statements with which he disagreed. It is his understanding of law that only those facts to which both parties agree can be stipulated.

Trial was set for February 26, 1997. While enroute to San Diego, Petitioner Holgate experienced chest pain and shortness of breath. He was immediately driven to Eisenhower Medical Center (the closest hospital) in Rancho Mirage and admitted at 8:43 a.m. He underwent a battery of tests that resulted in him being wired with a heart monitor and told not to drive; to report back to the

hospital in 24 hours and to see a cardiologist. Mr. Darrel Spence, who drove Mr. Holgate to the hospital, telephoned the court to explain that Mr. Holgate was in emergency care.

Upon release, Mr. Holgate called the Court and spoke with Judge Laro's clerk who arranged for a three way conference call for the next day.

On February 27, 1997, at approximately 10:30 a.m., a conference call took place between Petitioner Holgate, attorney Salel and Judge Laro. During that call Mr. Salel inferred to Judge Laro that Petitioner Holgate was lying about his heart problem because he (Salel) had called Eisenhower Emergency and Mr. Holgate was not registered.

During the February 27 conference call Judge Laro asked Mr. Holgate if he had been to see the cardiologist. Holgate stated he had not. At that point Judge Laro instructed Petitioner Holgate to see if he could get in to a cardiologist before the next day and if so and if cleared, to show for trial on February 28, 1997 (the next day). The Judge also said that if Mr. Holgate did not see a doctor and was not cleared to drive, to telephone his clerk the following day by 10:00 a.m. and arrange another conference call.

On February 28, 1997, at approximately 10:00 a.m., Petitioner did call Judge Laro's clerk to let them know he still could not drive and to arrange the conference call with the Judge. The conference call was scheduled to take place between 10:30-11:00 a.m. The clerk instructed Mr. Holgate that he would be beeped on his pager based on the Judge's availability. Holgate waited until 2:30 p.m. then called the court again. At that point he was told that Judge Laro had finished his cases and was gone for the day.

One month later, Petitioners were notified in writing they had lost in Tax Court due to "lack of prosecution."

Under the care of Dr. Lester Padilla, Petitioner underwent additional tests.

In seeking to support his case, Mr. Salel cited several cases which have no bearing on this case. For example:

- Ducommon v. Commissioner, 732 F.2d 752 (10th Cir. 1983) In this case the Petitioner failed to prosecute, comply with a subpoena duces tecum and made no effort to settle or enter into a meaningful stipulation of the facts.

In Ducommon, neither the taxpayers nor their counsel appeared in court.

Petitioner Holgate has no attorney and was unable to appear due to health problems. He communicated with the court and made every effort to comply.

- New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934) This case involved the total reorganization of one corporation by another which involved the exchange of shares, stocks, etc. The attorney for New Colonial Ice Co. argued that the new company was the same as the old and therefore his client could claim net losses from the former company on the return of the new entity.

This case does not argue any of the facts in this case.

- Nicholas v. Commissioner, 70 T.C. 1057, 1064 (1978) This case involved a drug dealer whose business records could be used as documentary evidence of earned income even though they were seized during a drug raid. The ruling stated that the evidence was not overly broad.

Again, this has no bearing on the current case.

- Talmage v. Commissioner, 71 T.C.M. 2370 (1996) This case is used to support Respondent's claim that Petitioner Holgate failed to cooperate in negotiations. However, this case involves a "tax protester" who claimed he "was not subject to the jurisdiction of the Internal Revenue Service; that he was not a taxpayer or person as defined in the Code;..."

Mr. Holgate has NEVER claimed that he is not subject to the jurisdiction of his government in all its power. In fact, he has followed all laws and rules; has attempted to negotiate with Respondent and been rebuffed.

- Welch v. Helvering, 290 U.S. 111 (1993) In this case, Mr. Welch tried to prove that expenses were capital outlays rather than ordinary business expenses.

Petitioner Holgate has never made any such claim. He merely objects to the IRS "estimating" an income that didn't occur and demanding that taxes be paid on the non-existent income.

Feeling frustrated and overwhelmed by the abuse of unmitigated power and intimidation by the IRS, Mr. Holgate contacted Senator Roth during the hearings on IRS reform. He is gratified that Congress enacted changes to the IRS Code (HR 2676-PL 105-206) which address issues raised in this case. Petitioner Holgate now asks if the protections mandated in this new legislation apply to those who are currently fighting the same issues?

ARGUMENT FOR ALLOWANCE OF THE WRIT

The appellate court erred in their ruling in finding that the U.S. Tax Court was correct. In their ruling against the Holgates, the Ninth Circuit Court cited that the Holgates

> "...missed settlement meetings, refused to produce documents before trial, and failed to file a trial memorandum...failed to enter into a stipulation of facts, and failed to appear for trial."

The court ruled that Mrs. Holgate could have appeared for trial in Mr. Holgate's absence. Since Mr. Holgate had contact with the Judge's clerk on February 28, 1997 (the court date in question) and was instructed to wait for a conference call with the Judge, he was unaware that he—or Mrs. Holgate—was missing a court appearance on that date.

Mr. Holgate did not file a trial memorandum in Tax Court because he was unaware that he was required to do so. He was prepared to make his case before the court but while enroute to court, he experienced chest pains and shortness of breath, was driven immediately to the nearest hospital (Eisenhower Medical Center in Rancho Mirage, CA) and missed that appearance. He did file a trial memorandum before the appellate court.

Further, the appellate court decision cites the allegation made by IRS that Mr. Holgate (while under doctor's orders not to drive, was driving while speaking on a car phone to Mr. Timothy Salel, IRS attorney). This is untrue. Mr. Salel offered no proof of his allegation but it was cited by the court as fact. In fact, Mr. Holgate did speak to Mr. Salel on a cellular telephone from a breakfast meeting to which he had been driven. If he had known the IRS would make additional false claims and had been able to see those claims before they were presented to the appellate court, he could have produced witnesses to his call and had the person who drove him also submit a sworn statement that Mr. Holgate was not driving during the call in question.

CONCLUSION:

The Petitioners seek a reversal of the Tax Court and Appellate Court rulings which determined that the Holgates (Petitioners) owe taxes due on "estimated" income by the IRS.

Respectfully submitted,

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEPHEN RUSSELL HOLGATE; KAREN LEE HOLGATE,	)	No. 97-70809
Petitioners-Appellants	)	Tax Court No. 14519-96
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	MEMORANDUM*
Respondent-Appellee.	)	

Appeal from the United States Tax Court

Submitted February 9, 1998**

Before: PREGERSON, CANBY, AND LEAVY, Circuit Judges.

Stephen Russell Holgate and Karen Lee Holgate appeal pro

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

se from the Tax Court's decision dismissing their petition for redetermination of tax and finding income tax deficiencies and additions to tax for 1986, 1988, 1990, and 1991 on grounds of failure to file timely returns and pay estimated taxes. The Holgates contend that the Tax Court erred by granting the Commissioner of Internal Revenue's motion to dismiss their case for failure to prosecute. We vacate in part and affirm in part.

The Commissioner correctly concedes that the Tax Court lacked jurisdiction under 26 U.S.C. § 6213 (a) to enter its decision against Mrs. Holgate for 1990 and 1991 because the notice of deficiency for those years was addressed solely to her husband. See Abrams v. Commissioner, 814 F.2d 1356, 1357 (9th Cir. 1987) (per curiam) (deficiency notice must advise taxpayer that his or her return is deficient). Accordingly, we vacate the Tax Court's decision against Karen Holgate for 1990 and 1991.

The Holgates contend that because Mr. Holgate had been hospitalized and told not to drive, the Tax Court erred by dismissing the case after they failed to appear for trial on February 26 and 28, 1997. The record reflects that Mr. Holgate was driving during a conference call with the court on February 27, and the Holgates do not explain why Mrs. Holgate could not have driven or why she did not appear for trial. The Tax Court reset the trial to accommodate Mr. Holgate's illness, and the Holgates missed settlement meetings, refused to produce documents before trial, and failed to file a trial memorandum. We find no abuse of discretion.

See Noli v. Commissioner, 860 F.2d 1521, 1527 (9th Cir. 1988) (Tax Court must explore meaningful alternatives b e fore dismissing a case); (dismissal proper when taxpayers had obtained numerous continuances, failed to produce records after being subpoened, failed to enter into a stipulation of facts, and failed to appear for trial).

We affirm in all respects except we vacate the Tax Court's decision against Karen Holgate for 1990 and 1991. The parties shall bear their own costs on appeal.

AFFIRMED in part, VACATED in part.

UNITED STATES TAX COURT
Washington, D.C. 20217

STEPHEN RUSSELL HOLGATE &
KAREN LEE HOLGATE

Petitioners,

v. Docket No. 14519-96

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

ORDER OF DISMISSAL AND DECISION

This case was recalled from the calendar for the Trial Session of the Court on February 28, 1997, in San Diego, California. There was no appearance by or on behalf of petitioners. Counsel for respondent appeared and filed with the Court a motion to dismiss for failure to properly prosecute. Upon due consideration, and for cause appearing in the transcript of the proceeding, it is

ORDERED that respondent's motion is granted, and this case is dismissed for lack of prosecution. It is further

ORDERED and DECIDED that there are deficiencies in income tax and additions to tax due from petitioners for the taxable years 1986, 1988, 1990 and 1991 as follows:

Tax Year Ended	Deficiency	Additions to Tax, 6651(a)(1)	I.R.C. Sections 6654(a)
1986	$ 7,721.00	$1,930.00	$372.00
1988	$ 6,673.00	$1,668.00	$427.00
1990	$13,187.00	$3,297.00	$866.00
1991	$12,667.00	$3,167.00	$730.00

/s/ David Laro
David Laro
Judge

Entered: MAR 28 1997